85

FILE COPY

Supreme Court, U.S.
FILED
JUL 9 197

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-85

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, ET AL., and CITY OF LUVERNE, ET AL., *Petitioners*

v.

PRICE COMMISSION, ET AL., COST OF LIVING COUNCIL, CHAIRMAN OF THE COST OF LIVING COUNCIL, and ALABAMA POWER COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BENNETT BOSKEY
D. BIARD MACGUINEAS
Volpe, Boskey and Lyons
918 - 16th Street, N.W.
Washington, D. C. 20006
Counsel for the Cooperatives (Baldwin County Electric Membership Corporation, et al.)

REUBEN GOLDBERG
ARNOLD FIELDMAN
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

MAURICE F. BISHOP
Bishop, Carlton & Sweeney
601-09 Frank Nelson Building
Birmingham, Alabama 35203
Counsel for the Municipalities (City of Luverne, et al.)

July 1973

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Regulatory and Statutory Provisions Involved	2
Statement	3
Reasons for Granting the Writ	6
Conclusion	9
Appendix A—Excerpt from Announcement by Price Comission Office of Public Affairs	1a
Appendix B—Order of District Court	2a
Appendix C—Opinion of Temporary Emergency Court of Appeals	3a
Appendix D—Judgments of Temporary Emergency Court of Appeals	18a
Appendix E—Excerpts from Judicial Review Provisions of Economic Stabilization Act of 1970, as Amended	19a

TABLE OF CASES

Atchison, Topeka and Santa Fe Railway Co. v. *Wichita Board of Trade*, No. 72-214 in this Court, decided June 18, 1973	8
W. P. Brown & Sons Lumber Co. v. *Louisville & N. R. Co.*, 299 U.S. 393 (1937)	8
Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962)	8
Gulf States Utilities Co. v. *F.P.C.*, 93 S.Ct. 1870 (1973)	8
Lockerty v. *Phillips*, 319 U.S. 182 (1943)	9
Stark v. *Wickard*, 321 U.S. 288 (1944)	6
United States v. *Cincinnati Transit, Inc.*, 337 F.Supp. 1068 (S.D. Ohio 1972)	9
United States v. *Moorman*, 338 U.S. 457 (1950)	9

Page

OTHER AUTHORITIES:

Economic Stabilization Act of 1970, as amended, Section 211 ..... 1, 3, 5, 9

Federal Power Act, Section 305(e), 16 U.S.C. § 824d(e) 4

Price Commission Regulations, Section 300.16(i)(3) .. 2, 5, 6

Supreme Court Rule 48 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, ET AL., and CITY OF LUVERNE, ET AL., *Petitioners*

v.

PRICE COMMISSION, ET AL., COST OF LIVING COUNCIL, CHAIRMAN OF THE COST OF LIVING COUNCIL, and ALABAMA POWER COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

OPINIONS BELOW

The Price Commission rendered no opinion; the announcement of its action is in Appendix A, infra, p. 1a. The District Court did not render an opinion; its order is in Appendix B, infra, p. 2a. The Temporary Emergency Court of Appeals opinion, not yet reported, is in Appendix C, infra, beginning at p. 3a; Judge Hastie's dissent begins at p. 8a.

JURISDICTION

The Temporary Emergency Court of Appeals entered its judgments on June 18, 1973 (Appendix D, infra, pp. 18a-19a). This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabili-

zation Act of 1970, as amended, P.L. 92-210 (85 Stat. 750).

QUESTION PRESENTED

Whether the Temporary Emergency Court of Appeals was justified, on grounds of the "great deference" owing to an agency interpretation of its own regulations, in sustaining Price Commission action approving an interim rate increase which plainly failed to comply with mandatory requirements of Price Commission regulations published and put into effect prior to the effective date of the rate increase. Or whether, instead, the majority decision amounts to an abdication of the important function of judicial review which Congress insisted was to be a fundamental safeguard against arbitrary administrative action in cases and controversies arising out of the economic stablization program—particularly when the so-called agency interpretation relied on here has never been articulated by the agency.

REGULATORY AND STATUTORY PROVISIONS INVOLVED

The Price Commission regulations issued January 14, 1972, effective January 17, 1972, provided in Section 300.16(i)(3) as follows (37 F.R. 653):

> (i) *Regulated public utilities—interim report on increases put into effect subject to accounting and refund.*
>
> * * *
>
> (3) Notwithstanding any other provision of this section, no price of the kind covered by this paragraph (i) may be increased before the end of the maximum suspension period permitted by law unless the regulatory agency has certified to the Price Commission that there is good cause for an earlier effective

> date, together with its reasons therefor, and the Price Commission has approved that certification.

Pertinent excerpts from the judicial review provisions of Section 211 of the Economic Stabilization Act of 1970, as amended, P.L. 92-210 (85 Stat. 748-750) are in Appendix E, infra, pp. 19a-23a.

STATEMENT

Judge Hastie's dissent (Appendix C, infra, beginning at p. 8a) sets forth the facts, which may be summarized as follows:

Petitioners, Alabama Cooperatives and Municipalities, purchase power at wholesale from Alabama Power Company. They brought this suit to challenge certain action whereby the Price Commission approved very substantial (about 35%) interim rate increases by Alabama Power despite total non-compliance with Price Commission regulations, mandatory on their face, which became effective before the rate increases were scheduled to go into effect.

On January 14, 1972 the Price Commission published new regulations, effective January 17, 1972, covering interim rate increases by regulated public utilities (37 F.R. 653). The regulations (see p. 2, supra) provided that no such rate may be increased before the end of the maximum suspension period permitted by law "unless the regulatory agency has certified to the Price Commission that there is good cause for an earlier effective date, together with its reasons therefor, and the Price Commission has approved that certification."

At the time these new Price Commission regulations became effective, petitioners were involved as inter-

venors in a pending Federal Power Commission ("FPC") proceeding (FPC Docket No. E-7674) contesting Alabama Power's proposed increases in its wholesale rates to Cooperative and Municipal customers. Alabama Power had filed application for the substantial rate increases with FPC on November 1, 1971, asking that the increases become effective January 3, 1972. On December 30, 1971 the FPC issued an order imposing a suspension period of one month only—instead of the five-month maximum suspension period permitted by law (Section 305(e) of the Federal Power Act, 16 U.S.C. § 824d(e)), which petitioners had sought. Under the December 30 FPC Order, if it became final, the rate increases would have gone into effect on an interim basis on February 2, 1972 if the Price Commission regulations had not intervened. (The FPC order was not yet final, since petitioners had filed timely applications for rehearing with FPC, which were still pending when the Price Commission regulations were published on January 14 and became effective on January 17.) The new Price Commission regulations—which obviously contained no exception for rate increases already scheduled to go into effect at some date in the future—were promptly brought to the attention of FPC on January 21 by petitioners, who cited the regulations as a further ground requiring the suspension to be no less than five months. On January 17, Alabama Power itself had written to the Price Commission that Alabama Power was undertaking to obtain from FPC the certification required by the new Price Commission regulations "in sufficient time for tender to the Price Commission prior to February 3, 1972".

FPC never issued the certification which Alabama Power Company undertook to obtain and which the

Price Commission regulations made mandatory if an interim rate increase were to be permitted to go into effect with less than a five-month suspension. Instead, on February 11, FPC denied petitioners' rehearing applications, adding what Judge Hastie's dissent refers to as "a correct but unilluminating statement" that the FPC order of December 30 was "in conformity with the Regulations in effect at that time".

Petitioners promptly filed with the Price Commission, on February 17, a petition asking the Price Commission to suspend or rescind the February 2 interim rates as price increases plainly prohibited by Section 300.16(i)(3) of the Price Commission regulations. On March 24, 1972 the Price Commission's Office of Public Affairs issued an unsigned "Decision List 74-56" which, in the course of eight pages of tabulations of actions taken, included an announcement that the Price Commission had approved the Alabama Power interim rate increase (see Appendix A, infra, p. 1a). Neither in this announcement, nor elsewhere in the course of whatever decision process it may have utilized, did the Price Commission explain, or even state expressly, why Section 300.16(i)(3) of its regulations does not plainly cover this case so as to make the five-month suspension mandatory; nor did it say who on the staff of the Price Commission, if anyone, thought that the regulations did not plainly cover this case.

Pursuant to Section 211 of the Economic Stabilization Act of 1970, as amended, P.L. 92-210 (Appendix E, infra, pp. 19a-23a), petitioners then, on April 13, 1972, brought suit against the Price Commission and its members, in the United States District Court for the District of Columbia, seeking a declaratory determination that the Price Commission's action in approving the Alabama Power interim rate increases was

invalid as violative of Section 300.16(i)(3) of the Price Commission's own regulations. Alabama Power intervened as a party defendant. Motions for summary judgment were made by both sides, and the District Court (Judge Hart) entered summary judgment for the defendants (Appendix B, infra, p. 2a). On petitioners' consolidated appeals, the Temporary Emergency Court of Appeals on June 18, 1973, affirmed by a vote of 2-to-1. The majority opinion was by Judge Johnson (Appendix C, infra, beginning at p. 3a). Judge Hastie wrote the dissenting opinion (Appendix C, infra, beginning at p. 8a).*

REASONS FOR GRANTING THE WRIT

This case involves important principles concerning the nature and the effectiveness of the judicial review process which Congress insisted shall be a fundamental safeguard in the economic stabilization program.

Respondents presumably will claim that Supreme Court review is not warranted because the case involves

---

* While the case was awaiting decision in the Temporary Emergency Court of Appeals, the President, on January 12, 1973, issued Executive Order 11695 (38 F.R. 1473) which terminated Phase II of the Economic Stabilization Program and, among other things, provided for abolishing the Price Commission within not more than 90 days and transferred and assigned various functions to the Cost of Living Council and its Chairman. Pursuant to the Executive Order, the Cost of Living Council terminated the Price Commission effective March 1, 1973 (38 F.R. 6099). Section 3(c) of the Executive Order expressly provided that "This order shall not operate to defeat any suit, action, prosecution, or administrative proceeding, whether heretofore or hereafter commenced, with respect to any right possessed, liability incurred, or offense committed prior to this date." In view of the foregoing, although the Temporary Emergency Court of Appeals did not change the caption of the case, we have nevertheless, out of an abundance of caution, named the Cost of Living Council and its Chairman as additional parties respondent in this Court. Compare Rule 48, paragraphs 3 and 4; *Stark* v. *Wickard*, 321 U.S. 288, 289 (1944).

a question of interpreting particular Price Commission regulations which are no longer in effect and which, so far as appears, are not an outstanding issue in any other case. But any such contention, while perhaps having some superficial attractiveness, is basically unsound.

It is quite evident that price regulation—together with other aspects of economic stabilization measures to combat inflation—is now one of the major areas of concern of the Federal Government and that this situation can be expected to continue for some time. In this vital area it is of special importance that the lawless administration of the law be discouraged and stamped out, and that conditions be created which would justify public confidence in the fair and impartial administration of the law. Those who regulate prices and wages—who hold in their hands such vast power over the economic life of the Nation—must understand that the courts will not rubber-stamp any action which they take and that certain minimum standards of fairness and competence are fundamental to the lawful discharge of their administrative responsibilities.

As Judge Hastie's dissenting opinion makes so clear, this case manifests a total non-compliance with such standards. Instead, the majority of the Temporary Emergency Court of Appeals has placed its reliance on the "great deference" which it felt the courts should give to an administrative agency's interpretation of the agency's own regulations (see Appendix C, *infra,* p. 7a). The majority has done this despite numerous circumstances which should have compelled the opposite result, including the following:

(i) the Government has admitted that no member of the Price Commission had any participation in the so-called interpretation;

(ii) the subordinate official to whom the Government argued, belatedly, that the power of decision had been delegated did not even claim that he himself had made the decision, but only that the decision had been made by his "office"—the actual person or persons being left wholly unidentified and whether they were professionals or clerks being unspecified; and

(iii) during the consideration and determination of this matter, not a syllable of articulation was ever proffered from the Price Commission as to the reasons why anyone thought such an interpretation of the regulations—which on their face so plainly read the other way—was even tenable.

Such blind judicial acceptance of unarticulated agency action, in the guise of administrative interpretation, is squarely contrary to the principles established by applicable decisions of this Court. E.g., *W. P. Brown & Sons Lumber Co.* v. *Louisville & N. R. Co.*, 299 U.S. 393 (1937); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-168 (1962); *Gulf States Utilities Co.* v. *F.P.C.*, 93 S.Ct. 1870, 1880 (1973). Thus only the other day in *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade*, No. 72-214, decided June 18, 1973, slip opinion, p. 6, the Court reemphasized it is a "fundamental rule of administrative law" that "the agency must set forth clearly the grounds on which it acted" and "we must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process."

Moreover, the decision below reflects a judicial approach which represents a grave departure from the

accepted and usual course of judicial proceedings, so as to call for an exercise of this Court's power of supervision. The result is all the more bizarre and incongruous because in other circumstances it has been fully recognized that price freezes and price regulations cut across proposed price increases which have not yet gone into effect at the time of the effective date of the price directive. See, e.g., *United States* v. *Cincinnati Transit, Inc.*, 337 F. Supp. 1068 (S.D. Ohio 1972).

The importance of the matter and the need for review by this Court are underscored by the fact that, under the Economic Stabilization Act, the Temporary Emergency Court of Appeals is the sole court of appeals having jurisdiction over judicially-reviewable questions which that Act gives rise to. Direct conflicts of decisions between the circuits will not occur because Congress saw fit to concentrate all such appeals in the single Temporary Emergency Court of Appeals. Section 211 of the Economic Stabilization Act of 1970, as amended (see Appendix E, *infra*, pp. 19a-23a); compare *Lockerty* v. *Phillips*, 319 U.S. 182, 186-189 (1943). Blind deference by that Court to unarticulated administrative interpretations—particularly those so ephemerally-based as this one—is an invitation to disaster.

Intervention by this Court is accordingly called for.

CONCLUSION

The petition for certiorari should be granted. On the merits, as Mr. Justice Black said for the Court in *United States* v. *Moorman*, 338 U.S. 457, 463 (1950), "The language . . . is clear" and "No ambiguities can be injected into it by supportable reasoning." Since for the reasons stated in Judge Hastie's dissenting opinion the decision of the Temporary Emergency

Court of Appeals is so plainly wrong, it is suggested that the case is an appropriate one for summary reversal.*

Respectfully submitted,

BENNETT BOSKEY
D. BIARD MACGUINEAS
Volpe, Boskey and Lyons
918 - 16th Street, N.W.
Washington, D.C. 20006
Counsel for the Cooperatives (Baldwin County Electric Membership Corporation, et al.)

REUBEN GOLDBERG
ARNOLD FIELDMAN
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

MAURICE F. BISHOP
Bishop, Carlton & Sweeney
601-09 Frank Nelson Building
Birmingham, Alabama 35203
Counsel for the Municipalities (City of Luverne, et al.)

July 1973

---

* Various other contentions raised by the respondents were not decided by the Temporary Emergency Court of Appeals. In that Court petitioners' position was that none of those other contentions should be an obstacle to granting summary judgment in favor of petitioners; that remains our position here. However, we assume that, if the judgment is summarily reversed, then this Court may wish to remand the case to the Temporary Emergency Court of Appeals to permit the latter to rule on such contentions in the first instance.